

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

United States Court of Appeals  
Fifth Circuit

**FILED**

August 5, 2011

Lyle W. Cayce  
Clerk

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No. 11-10133  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARCIAL CASTRO,

Defendant-Appellant

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:10-CR-204-1

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Before BENAVIDES, STEWART and CLEMENT, Circuit Judges.

PER CURIAM:\*

Marcial Castro pleaded guilty to one count of unlawful reentry and was sentenced to 120 months in prison. He now appeals, arguing that the district court erred by ordering that his federal sentence run consecutively to any sentence that might be imposed in a pending state criminal case. The Government has moved to dismiss the appeal based on a waiver contained in Castro's post-plea sentencing agreement, or for summary affirmance on the basis

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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of binding circuit precedent. Alternatively, the Government seeks an extension of time to file a brief. Castro argues that the waiver does not bar the appeal.

We need not reach the disputed waiver issue because, as Castro concedes, his argument is foreclosed by *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006), in which we held that a district court may order a term of imprisonment to run consecutively to a yet-to-be-imposed state sentence. Despite Castro's arguments that *Brown* was incorrectly decided, *Brown* remains the law of this circuit, as we held in *United States v. Setser*, 607 F.3d 128, 131-32 (5th Cir. 2010), *cert. granted*, 2011 WL 2297806 (June 13, 2011) (No. 10-7387). Although the Supreme Court has granted a writ of certiorari in *Setser*, this court is bound to follow precedent even when certiorari has been granted. *See United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008).

The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED. The Government's motions to dismiss and, alternatively, for an extension of time are DENIED.